

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 31, 2010




C. Kathryn Preston
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Case No. 08-53659
Joy L. Marshall	:	Chapter 7
	:	Judge Preston
Debtor	:	
<hr/>		
Dickson & Campbell, L.L.C.	:	
Plaintiff	:	
v.	:	Adv. Pro. No. 08-02335
Joy L. Marshall	:	
Defendant	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION

This cause came on for hearing on January 8, 2010, on the Complaint to Deny Discharge of Debt Owed to Dickson & Campbell, L.L.C. (Doc. 1), filed October 15, 2008. The Court took the matter under advisement, and after consideration of the issues raised, evidence presented, and arguments made by counsel, makes the following findings of fact and conclusions of law.

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, and the standing General Order of reference entered in this District. This matter is a core proceeding pursuant to 28 USC § 157(b)(2)(I). Venue is properly before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Findings of Fact

This adversary proceeding arises out of a dispute regarding attorney fees earned in a nursing home negligence case brought by Bessie Tyus in the Court of Common Pleas of Cuyahoga County, Ohio (sometimes referred to as the “State Court case”). The Plaintiff, William P. Campbell (“Plaintiff”) initially represented Ms. Tyus in the State Court case but subsequently withdrew as counsel. The Defendant, Joy L. Marshall (“Defendant”) was substituted as Ms. Tyus’ counsel in the State Court case. Shortly after the substitution of counsel occurred, the State Court case was settled for the sum of \$150,000. Thereupon, the Plaintiff filed a motion to declare and enforce a charging lien upon the settlement proceeds. On June 12, 2006, the State Court issued an order directing the settlement proceeds to be distributed to the Defendant. The order also required the Defendant to distribute no more than \$85,000 to Ms. Tyus in the State Court case and that the remaining funds (the “Escrowed Funds”) must be maintained in the proper account pending the State Court’s ruling on the outstanding dispute regarding the Plaintiff’s charging lien. On June 22, 2006, the Plaintiff withdrew his motion to

enforce the charging lien and advised the court he would file an appropriate post-judgment motion to intervene and seek enforcement of the charging lien. The State Court did not, however, vacate its order directing escrow of the Escrowed Funds, or otherwise release the Defendant of her responsibilities under that order. The very next day, the Defendant released the Escrowed Funds to Ms. Tyus. Ms. Tyus remitted \$50,000 to the Defendant from the settlement proceeds for the Defendant's attorneys' fees.

On June 26, 2006, the Plaintiff filed a motion to intervene and enforce his charging lien as to the settlement proceeds. On August 1, 2006, the Defendant was replaced as counsel for Ms. Tyus in the State Court case by attorney Cassandra Collier-Williams. On August 15, 2006, the State Court granted the motion to enforce the charging lien of the Plaintiff and ordered the Defendant to transmit the Escrowed Funds in the amount of \$60,443 to Ms. Collier-Williams on or before August 18, 2006. The order further required Ms. Collier-Williams to transmit \$50,443 to the Plaintiff for his attorneys' fees in the State Court case. The State Court awarded the Defendant fees of \$4,557 for her services in the State Court case.

On August 21, 2006, Ms. Collier-Williams informed the State Court that the Defendant had failed to transmit the funds as required by the August 15, 2006 order. The State Court issued an order requiring the Defendant to appear and show cause why she should not be held in contempt for failure to comply with the State Court's orders to: 1) hold the Escrowed Funds in accordance with the State Court's June 12, 2006 order; and 2) transmit funds to Ms. Collier-Williams by August 18, 2006. On August 23, 2006, the State Court held the show cause hearing. The Defendant did not appear at the hearing, arriving at the court after the case was called and the hearing concluded. The State Court set a second hearing to show cause for August 28, 2006. Again, the Defendant did not appear, arriving too late for the hearing. Upon request by the

Defendant's attorney, the hearing to show cause was continued to September 21, 2006. Based upon the testimony by the Plaintiff and Ms. Collier-Williams offered at the August 23, 2006 hearing to show cause, and the testimony by the Defendant at the September 21, 2006 hearing to show cause, the State Court issued an order on September 22, 2006 finding the Defendant to be in contempt of court. Further, the State Court found that the Defendant "...specifically and willfully disobeyed the orders of [the] court and has misbehaved in the performance of her duties as an officer of the court" The State Court further held that the Defendant had "...disbursed and misappropriated funds ..." in violation of court order. *See* Plaintiff's Exhibit 1, Pg. 12.

On April 22, 2008, the Defendant filed a Petition for Relief under Chapter 13 of the Bankruptcy Code. The case was converted on March 15, 2009 to a case under Chapter 7 of the Bankruptcy Code. The Plaintiff filed the instant adversary proceeding, alleging that he suffered injuries and damages as a result of the Defendant's conduct, that the Defendant committed fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny, and that the injuries to the Plaintiff constitute willful and malicious injury by the Defendant. Therefore, according to the Plaintiff, his debt should be excepted from the Chapter 7 discharge pursuant to §523(a)(4) and (6) of the Bankruptcy Code.

III. Law and Analysis

In short, the Plaintiff complains that the Defendant's disbursement of the Escrowed Funds was an intentional act to deprive the Plaintiff of his attorneys' fees earned from the State Court case. In the First Claim of the Plaintiff's Complaint, he seeks a declaration that the debt attributable to the Defendant's conduct is non-dischargeable in that the Defendant engaged in fraud or defalcation while acting in a fiduciary capacity, or committed embezzlement or larceny. In the Second Claim, the Plaintiff seeks a declaration that the debt attributable to the Defendant's

conduct is non-dischargeable in that the Defendant's acts constituted willful and malicious injury to the Plaintiff.

Because the overarching purpose of the Bankruptcy Code is to provide a fresh start to those in need of relief from the efforts of creditors,¹ exceptions to discharge are to be strictly construed against the complaining party. *Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). However, the relief provided by the Bankruptcy Code is intended only for the "honest but unfortunate" debtor and not to protect perpetrators of fraud or those who engage in egregious conduct. *Grogan*, 498 U.S. at 287.

A. The Debt is Not Excepted from Discharge Pursuant to 11 U.S.C. § 523(a)(4)

Section 523 of the Bankruptcy Code provides, in relevant part, as follows:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . .

- (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . .

11 U.S.C. § 523(a)(4).

The phrase "while acting in a fiduciary capacity" applies only to the words "fraud or defalcation"; embezzlement and larceny are separate grounds for non-dischargeability under § 523(a)(4) whether or not a fiduciary relationship existed. *Nat'l City Bank v. Imbody (In re Imbody)*, 104 B.R. 830, 840 (Bankr. N.D. Ohio 1989). Therefore, a plaintiff can prevail under § 523(a)(4) by establishing that the defendant committed either (1) fraud or defalcation while acting in a fiduciary capacity, or (2) embezzlement, or (3) larceny.

¹ *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

While the Plaintiff's Complaint cursorily discusses "fraud or defalcation while acting in a fiduciary capacity," it is apparent that this particular basis for non-dischargeability is not applicable in this case. The "fiduciary capacity" component has been interpreted by the Sixth Circuit Court of Appeals to apply only to those situations involving an express or technical trust; establishing the existence of such a trust requires the creditor to show "(1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary." *Ohio Carpenter's Pension Fund v. Bucci (In re Bucci)*, 493 F.3d 635, 639–40 (6th Cir. 2007) (quoting *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391–92 (6th Cir. 2005)). The evidence does not support the establishment of an express or technical trust in this case. In fact, the State Court order requiring the Defendant to hold the settlement funds until the fee dispute could be resolved is evidence that no definite beneficiary of the funds had been established. Therefore, an express or technical trust could not have been established.

For the purposes of § 523(a)(4), embezzlement is the " 'fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.' " *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172–73 (6th Cir. 1996) (citing *Gribble v. Carlton (In re Carlton)*, 26 B.R. 205 (Bankr. M.D. Tenn. 1982)). "A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *Brady*, 101 F.3d at 1173 (citing *Ball v. McDowell (In re McDowell)*, 162 B.R. 136, 140 (Bankr. N.D. Ohio 1993)). The fraud element may also be satisfied by a showing of deceit. *See Imbody*, 104 B.R. at 841 (stating that "[m]ost courts that have considered the issue have held that acting with deceit will satisfy the fraudulent intent requirement" of embezzlement); *H.P. Marketing Corp. v. Mills (In re Mills)*, 210 B.R. 289, 292

(Bankr. N.D. Ohio 1996) (stating the third element of embezzlement is the use of “some form of fraud or deceit”). Each of these elements must be proven by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991) (holding that the standard of proof for the dischargeability exception in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard). While embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, it differs from larceny in that the original taking or possession of the property is lawful, or with the consent of the owner. Larceny requires that felonious intent must have existed at the time of the taking. *Moore v. U.S.*, 160 U.S. 268 (1895).

The Plaintiff is unable to establish the elements of embezzlement or larceny under §523(a)(4). While the State Court ordered the Defendant to maintain the settlement proceeds in an appropriate account, the Escrowed Funds were not property of the Plaintiff at the time the Defendant disbursed them, as the dispute regarding the attorneys’ fees had not yet been resolved. Notwithstanding the State Court’s contempt order stating the Defendant had misappropriated the Escrowed Funds in violation of court order, because the Escrowed Funds were not property of the Plaintiff at the time the Defendant disbursed such funds, the Plaintiff cannot establish a required element of embezzlement or larceny.

B. The Debt is for Willful and Malicious Injury by the Debtor to Plaintiff and is Excepted from Discharge Pursuant to 11 U.S.C. § 523(a)(6)

Section 523 of the Bankruptcy Code provides, in relevant part, as follows:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . .

- (6) for willful and malicious injury by the Debtor to another entity or to the property of another entity[.]

11 U.S.C. § 523(a)(6).

Because the word “willful” in the statute modifies the word “injury,” the United States Supreme Court has concluded that §523(a)(6) requires a “deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). “[T]he actor must intend ‘the *consequences* of an act,’ not simply ‘the act itself.’” *Id.* at 61–62 (emphasis in original) (citation omitted).

Willfulness is shown when it is demonstrated that the debtor either had a desire to cause the consequences of his act, or believed that injury was substantially certain to result from his conduct. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). *See also Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001). The focus is on the debtor’s state of mind. The fact that the debtor *should* have known the consequences of his actions is not sufficient to satisfy the requirements of willfulness. *Markowitz*, 190 F.3d at 465 n.10. Similarly, damages arising from conduct which is reckless or negligent do not fall within the purview of § 523(a)(6). *Kawaauhau*, 523 U.S. at 59.

The requirement of maliciousness is met when it is demonstrated that (1) the debtor has committed a wrongful act, (2) the debtor undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause or excuse for the action. *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226, 1228 (6th Cir. 1991); *Jercich*, 238 F.3d at 1209.

1. Defendant’s Actions and Conduct Constitute Willful Injury to the Plaintiff Pursuant to 11 U.S.C. §523(a)(6)

Plaintiff posits that the Defendant willfully and maliciously caused injury to the Plaintiff by disbursing the Escrowed Funds in violation of the State Court’s June 12, 2006 order. The Defendant’s testimony, both offered by the Defendant as well as that given on cross-

examination, evidence the Defendant's intent to cause the consequences of her acts.

Furthermore, the Defendant's testimony evidenced that she believed injury to the Plaintiff was substantially certain to result from her conduct.

The Defendant emphasized that she had worked over 100 hours on the State Court case and that the Plaintiff had worked approximately 30 hours on the case. The Defendant also testified that she had to amend the complaint filed by the Plaintiff to include other causes of action that would have been barred by the applicable statute of limitations had she not done so.

The Defendant's testimony clearly established that she believed she was entitled to the lion's share of the attorneys' fees resulting from the State Court case, while the Plaintiff was entitled to little, if any, fees. By disbursing the Escrowed Funds in violation of the State Court order and prior to the resolution of Plaintiff's charging lien, it is clear that the Defendant desired to deprive Plaintiff of recovering the funds in payment of attorneys' fees for his services in the State Court case. Notwithstanding the Defendant's testimony that she did not intend for the Plaintiff to be denied his attorneys' fees in the case, her conduct indicates that the Defendant believed the Plaintiff would be deprived of access to the Escrowed Funds, and thus payment of his attorneys' fees, as a result of the disbursement of funds. Therefore, the Defendant believed injury to the Plaintiff was substantially certain to result from her conduct. The facts and evidence in this case clearly establish that the Defendant intended to cause injury to the Plaintiff.

2. Defendant's Actions and Conduct Constitute Malicious Injury to Plaintiff Pursuant to 11 U.S.C. §523(a)(6)

As discussed above, for a finding of maliciousness, the Plaintiff must show that (1) the debtor has committed a wrongful act, (2) the debtor undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause or excuse for the action. The evidence in

this case clearly establishes that the Defendant committed a wrongful act by disbursing the Escrowed Funds in contravention of the State Court order. The Defendant was subject to multiple show cause hearings for disbursing the Escrowed Funds without leave of court. The State Court found that the Defendant willfully disobeyed the orders of the court, and had misbehaved in the performance of her duties as an officer of the Court. Furthermore, the State Court recognized that the Defendant had disbursed and misappropriated funds in violation of court order. As a result of the State Court findings, the Defendant was remanded to the county jail for failure to comply with the State Court's June 12, 2006 and August 15, 2006 orders.

The evidence also establishes the second element of maliciousness and shows that the Defendant undertook the act of disbursing the Escrowed Funds intentionally. On June 22, 2006, the Defendant contacted her client to set up a meeting for the disbursement of the Escrowed Funds. On June 23, 2006, the Defendant disbursed the remaining Escrowed Funds to her client pursuant to a settlement agreement signed by the client. The third element of maliciousness is satisfied as the Defendant's disbursement of the Escrowed Funds to her client deprived the Plaintiff from recovering his attorneys' fees and, therefore, caused the injury to the Plaintiff.

The evidence also establishes the fourth element of maliciousness in that the Defendant offered no just cause or excuse for her actions. The Defendant argues that she believed no dispute existed at the time she disbursed the Escrowed Funds as the Plaintiff had withdrawn his motion to enforce the charging lien. However, the State Court case docket entry dated June 22, 2006, noting withdrawal of the Plaintiff's motion to enforce charging lien, also stated that the Plaintiff would be filing the appropriate post-judgment motion to intervene and seek enforcement of his charging lien. Furthermore, the State Court's order requiring the Defendant to maintain the Escrowed Funds in an appropriate account had not been vacated. Thus, Defendant's reliance

upon the June 22, 2006 entry as settling the dispute over attorneys' fees simply does not support her position. The Defendant's theory that the Plaintiff no longer had an interest in the Escrowed Funds is simply disingenuous. The Defendant is a practicing attorney with approximately eight years of practical experience. Therefore, the June 22, 2006 entry put the Defendant on notice that the dispute over attorneys' fees was still pending and she was, therefore, still obligated under the State Court's order to maintain the Escrowed Funds in an appropriate account. Because the Defendant knew there was still an outstanding dispute regarding fees, the Defendant has not proven that a just cause or excuse existed for her conduct.

IV. Conclusion

The Plaintiff having demonstrated that the Defendant's conduct caused willful and malicious injury to the Plaintiff, the Court shall enter judgment in favor of the Plaintiff in this matter, and the debt owed to the Plaintiff by the Defendant in the amount of \$50,443 will be declared non-dischargeable pursuant to 11 U.S.C. §523(a)(6).

IT IS SO ORDERED.

Copies to:

William P. Campbell, Pro Se (Electronic Service)
Joy L. Marshall, Pro Se (Electronic Service)

#